NOS. 15225 - 15226

United States Court of Appeals

FOR THE NINTH CIRCUIT

CHARLES S. THOMAS, Assistant Secretary of Defense for the Navy, et al.,
Appellant,

vs.

UNITED STATES OF AMERICA on the Relation of Peter J. Smith,
Appellee.

REAR ADMIRAL A. M. BLEDSOE, U. S. Navy; CAPT. J. J. GREYTAK, U. S. Navy, et al.,
Appellant,

vs.

UNITED STATES, ex rel LOUIS V. BOSCOLA,
Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HONORABLE WILLIAM J. LINDBERG, *Judge*

REPLY BRIEF OF APPELLANTS

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APPELLANTS' ALLEGED FAILURE TO COMPLY WITH RULE 18, 2(d)

While appellants must concede that there has not been as full a compliance with Rule 18, 2 (d) for the Court of Appeals for the Ninth Circuit as might be

desired, they are not prepared to concede that there has been no compliance at all. By way of confession and avoidance, appellants can only say that it was their intention to place before the Court of Appeals in as succinct a form as possible the legal points involved without surplus verbiage. It may be that they have been misled in the direction of brevity by following previous records filed in the Court of Appeals and it is noted that in other cases, while finding a non-compliance with the rules, the Court has nevertheless considered the errors complained of. Appellants feel that a clear issue is presented to the Court and respectfully request that the Court pass thereon in the interest of clarifying the law on the points involved.

Appellants have (although not in the specification of error on Appellants' Brief, page 3) set forth both the "full substance of the evidence admitted" and the "grounds of the objections urged at the trial" in the verbatim account of proceedings on page 52 of the Transcript of Record. It is appellants' contention that the erroneous admission of the oral stipulation (R. 52) formed the *sole* basis for the Court's finding and conclusion appealed from. The Court's Memorandum Opinion (R. 30, line 25) reveals that "At the time of hearing, while insisting that the fact was not material, respondents stipulated that the purpose of recalling

petitioners [appellees] to active duty was for the purpose of court martial." The Court then remarks that ". . . the written stipulation . . . as well as . . . the testimony of petitioners [appellees] and the exhibits admitted in evidence do not disclose that petitioners [appellees] were recalled for any particular duty or that any duty has been assigned them." It should be carefully noted that the Court is remarking on what it failed to find from the exhibits, testimony, etc. It is only when the complained of stipulation was introduced that the Court had a basis for its finding. Appellees' own brief (p. 3, line 17) states "The purpose of the recall is a matter of stipulation (R. 52)."

If the erroneously admitted oral stipulation formed the sole basis for the Court's finding and conclusion, then appellants have set everything before the Court of Appeals necessary to a determination in this matter although admittedly in not the most desirable form. Objection to the exhibits (although such actually was made — see *infra)* was not necessary. That such stipulation did form the sole basis of the Court's decision will be discussed *infra.*

Appellants are quite frankly surprised at appellees' contention that (a) appellants erred in not printing a record showing objection to appellees' exhibits, and (b) arguing in support of the judgment based

upon such exhibits. Appellees were absolutely entitled under Rule 17 to have any portion of the record printed which they deemed proper and appellants neither raised (nor could raise) any objection to the printing of the exhibits. It is one thing, however, for appellees to have a portion of the record printed and quite another for them to argue that such printed portion supports the judgment when it was neither offered for nor received for the use which the trial court made of it.

Appellees in the course of the hearing offered certain exhibits which are reproduced (R. 53-63). It is a truism of the law that evidence offered must pertain to an issue in the pleadings. It is likewise a well-known rule that evidence may be admissible for one purpose, and that alone, being inadmissible for other purposes. See Wigmore, *Evidence*, Third Edition, § 13, Vol. I, p. 299, and cases there cited. If multi-purposed evidence is offered in a jury trial, the adversary is, of course, entitled to a limiting instruction, but in trials to the court, it is presumed that the judge will apply the evidence properly. It follows, therefore, that if evidence be offered for a limited purpose, or having been offered generally is objected to and thereafter is offered or received for a limited purpose, that the adversary is entitled to assume that it will be applied by the trial court to that limited purpose. If the exhibits

reproduced (R. 53-63) were introduced for a limited purpose, unrelated to the ultimate finding and conclusion appealed from, it follows that objection was neither proper nor required.

Appellees have kindly stipulated to an augmentation of the record of proceedings in the trial court in order that it may be clear to the Court of Appeals for what purpose the exhibits were offered. We must first, in view of appellees' brief, analyze the pleadings and theory of the action. We have caused (by stipulation referred to) the reproduction of the proceedings in the trial court pertaining to the admission of the exhibits printed (R. 53-63). We shall refer to page and line of such stipulated augmentation. We shall refer to appellees' exhibits *seriatim*, bearing in mind that Exhibit 2 (R. 60) apparently appears out of order but actually was Exhibit 2 in appellee Smith's case, the other exhibits having been appellee Boscola's.

a. Appellee Boscola's Theory of Action and Introduction of Exhibits—

Appellee Boscola relied for his relief (insofar as pertinent to this appeal), as set out in paragraph V of his petition (R. 5, line 20), on the fact that " . . . the United States was not in a state of war, nor was there a national emergency in existence" and again alleged (R. 6, lines 22 - 29) that the illegality of appellant's

actions (insofar as 34 USC 433 was concerned) lay in the *time* at which the power was exercised, not the *purpose* for which it was exercised.

EXHIBIT 1 — R. 53

Mr. Day began his use of the exhibit at page 3, line 5 "as a help to the Court in seeing the full background of this case" and actually offered it at page 4, line 2. Objection was made by U. S. counsel (page 4, lines 5 - 18) on the ground that it was "irrelevant to any issue before this Court." Mr. Day continued his offer (page 5, lines 5 - 8) "merely to acquaint the Court with the successive steps" and the Court refused the offer.

Exhibit 1 was again offered by counsel on page 11. The colloquy in the trial court reveals confusion at this point (because of the similarity of numbers and content of the exhibits) but it is clear at page 11, lines 15 - 17 that Exhibit 1 had not yet been admitted. Proper objection was made on page 12, line 12 *et seq.* on the ground of materiality (line 15). U. S. counsel further objected on the ground that the purpose for which the exhibit was offered was not within the scope of the pleadings (page 14, line 4), objection was overruled and the exhibit admitted (page 14, line 15).

EXHIBIT 3 — R. 55

Mr. Day offered this exhibit (p. 3, l. 5) "as a help to the Court in seeing the full background of this case"; it was objected to as "irrelevant to any issue before this Court" (p. 4, l. 5 - 18).

Mr. Day offered Exhibit 3 again (p. 11) to "show that they were recalled to active duty for one purpose—for the purpose of subjecting them to courts-martial" (p. 10, l. 4) and U. S. counsel made proper objection on the ground of materiality (p. 12, l. 15) and the scope of the pleadings (p. 14, l. 5); objection was overruled and the exhibit was admitted (p. 14, l. 15).

EXHIBIT 4 — R. 56

Mr. Day offered this exhibit (p. 3, l. 5) "as a help to the Court in seeing the full background of this case"; it was objected to as "irrelevant to any issue before this Court" (p. 4, l. 5 - 18).

Mr. Day offered Exhibit 4 again (p. 11, l. 14) for no specifically stated purpose. Objection was made on the ground of materiality (p. 12, l. 15) and the scope of the pleadings (p. 14, l. 5); objection was overruled and the exhibit was admitted (p. 14, l. 15).

EXHIBIT 5 — R. 58

While printed in the transcript, it will be noted that this exhibit was never admitted for any purpose and it may be disregarded.

In further support of appellants' position that appellee Boscola's Exhibits 1, 3 and 4 were not offered for the use the Court made of them, we quote portions of Mr. Day's argument.

On page 18, line 2, *et seq.* it is clear that Mr. Day is arguing that the Navy lacked the power to recall Boscola because there was then no national emergency. He further takes the position (p. 18, l. 9) that the recall was in aid of jurisdiction and hence unlawful. He further states (p. 20, l. 9, *et seq.*) "Conceding [*arguendo*] . . . that they are rightfully in the Navy . . . we certainly would not concede that the fact that they have jurisdiction of their person at the present time meant that they had jurisdiction of the crime at the time it was committed."

It is believed clear, upon careful analysis, that Mr. Day is contending that UCMJ 2 (4) — the article of the code under which the Navy claims court-martial jurisdiction over retired enlisted men — is unlawful and that a mere placing the man on active duty (where he is concededly subject to court-martial) does nothing to confer court-martial jurisdiction retroac-

tively. Appellants have never conceded or theorized in any way that because appellees were *at the time of the charges* on active duty, that such status in any way improved the Navy's legal position. The jurisdiction under Article 2 (4), if it exist at all, depends in no way upon active duty status. Appellees are either subject to court-martial or not because they are retired regulars and not because of their active status at the time of trial. The purpose of Mr. Day's offer of Exhibit 3 becomes clear in the light of his argument despite his words ". . . recalled to active duty for one purpose — for the purpose of subjecting them to courts-martial" (p. 10, l. 4). He is not here arguing an illegal call to active duty because of the motive or purpose. He has already attacked the validity of their call to active duty on the ground that no national emergency exists. It must be clear, appellants believe, that his offer of Exhibit 3, in the light of his argument, is an attack on what he believed to be an attempt to confer jurisdiction retroactively. Such an argument was never advanced or even contemplated by appellants. Since appellees have raised the issue *dehors* the record, appellants can only answer that the sole reason for a call to active duty was the theory that if a retired, reserve or other person is to be at the disposal of the Navy for twenty-four hours per day, he should be paid for it. Since active duty personnel draw 100%

pay and allowances and retired personnel draw only reduced pay and no allowances, simple justice required their call to active duty in order that they might be lawfully compensated before and during court-martial proceedings — regardless of the result thereof.

But we believe it clear from reading Mr. Day's own words that he had no idea during hearing, argument, and offering exhibits that his offerings would be worked into the trial judge's solution, *i.e.*, that the call to active duty was void because its purpose was not within the purpose of the statute.

b. Appellee Smith's Theory of Action and Introduction of Exhibits—

Appellee Smith relied for his relief (insofar as pertinent to this appeal) upon paragraph VI and VII of his petition (R. 12-13) which, while couched more generally than Boscola's, make it plain that he relies upon the fact (par. VI) he was "out of the Navy" when his act took place, and (par. VII) that double-jeopardy would be involved. The remainder of his petition deals with factual recitals and the paragraphs cited are the only ones where the illegality of appellants' actions is complained of. It is true that appellee Smith's paragraph VI carries the sentence "That no right in law or statute exists authorizing the U. S. Navy or respondents to recall the petitioner to active

duty" and while this could conceivably extend to the trial court's finding and conclusions, it must be read in context and parallel to Boscola's petition. Counsel was well aware of 34 USC 433 and knew that if a war or national emergency existed, there was *some* power to call retired enlisted men to active duty. He must, therefore, have been pleading the non-existence of war or national emergency and not the novel solution arrived at by the trial court. Similarly, appellee Smith's paragraph VII carries a sentence "that the purported recall to active duty and attempted court-martial of petitioner by respondents *bears no reasonable relationship to the maintenance of discipline or regulations of the Naval forces of the United States* [*i.s.*]." The fact that this language is such a faithful paraphrase of the reasoning of the Supreme Court in *U. S. ex rel. Toth* v. *Quarles*, 350 U.S. 11, 100 L.Ed. 8, 76 S.Ct. 1 (1955) shows plainly that the petitioner [appellee] Smith's meaning was to plead the philosophy of the *Toth* case, not to question (in this paragraph, at least) the authority under 34 USC 433. Note should be taken specially of the *Toth* case at page 17, lines 8-9 (350 U.S.) and page 22, lines 4-8 where the similarity to Smith's pleading is most marked. No question of a recall to active duty was involved in *Toth* and the use of *Toth* language did not inject it into this pleading.

EXHIBIT 2 — R. 60

Mr. Short offered this exhibit (p. 6, l. 3) and objection was made by U. S. counsel on the ground of relevancy (p. 6, l. 10-11). Mr. Short made it clear (p. 6, l. 12 *et seq.;* p. 7, l. 15 *et seq.)* that he was offering this exhibit on a theory of estoppel or loss of jurisdiction by transferring Smith to the retired list with U. S. knowledge that he had committed a crime while in Fleet Reserve status. The trial court, rather startlingly, conceded (p. 9, l. 7) "The relevancy doesn't appear to me" but he overruled the objection and admitted the exhibit.

Mr. Short then argued (p. 21, l. 3) "the actual purpose is to pull him in and kick him out" but when queried by the Court as to substantiating evidence, he admitted (p. 21, l. 6) "Nothing. If I am obliged to prove that . . . I can't."

c. The Trial Court Made Its Finding Solely on the Basis of the Erroneously Admitted Stipulation—

The parties entered the trial court with appellees contending jointly *inter alia* that recall to active duty under 34 USC 433 was improper because no national emergency existed. This contention, we believe, is borne out by the stipulation for consolidation (R. 16) which recites that the causes are "reasonably believed to involve the same general issues at law."

Faced with this state of the pleadings the trial court took evidence, admitted exhibits and factual stipulations over objection, and arrived at the conclusion (paraphrasing liberally from the Memorandum Opinion and Findings and Conclusions) that a statute authorizing recall for "duty" under certain conditions, did not authorize a recall for court-martial. As stated in our opening brief (p. 17), the Court allowed no opportunity to argue the definition of "duty" and the resultant reasoning was a surprise to appellants, and (we suspect) to appellees. In any event, the relief was accorded petitioners [appellees] *but not upon any ground or theory pleaded by them.* Likewise, the result was not based upon any evidence introduced by petitioners [appellees] *for that purpose* and the sole basis for the Court's finding and conclusion was the erroneously admitted oral stipulation which was properly objected to on the grounds of "materiality and relevancy" (R. 52).

Appellants realize that since appellees have stated (appellees' brief, page 5, line 27) "This stipulation and objection was taken . . . [after] all of the appellees' exhibits had been admitted . . . . No objection of appellants to . . . exhibits is shown in the record on appeal" that it is incumbent upon appellants to show

that the exhibits were admitted for another purpose and *were neither offered for nor received by the Court* for the purpose for which they were ultimately used. In the absence of their being offered generally or for the specific use which the Court made of them, they did not have to be objected to and cannot be used to bolster the judgment.

Appellants believe that they have demonstrated from the stipulated augmentation of the transcript that appellees' exhibits were admitted on other bases and theories, neither encompassed in the pleadings nor argued by counsel. Even so, *after* all exhibits were admitted, the Court (p. 29, l. 9 *et seq.*) while evincing suspicion that the sole purpose of recall was for court-martial, conceded inability to make such a determination and Mr. Griffin (senior counsel for Smith) agreed with the Court (p. 29, l. 18). Matters remained in this status until page 36, line 9 when the Court remarked "That, of course, does not get to the one question which is the purpose of their recall."

It was at this stage of the proceeding that U. S. counsel entered the oral stipulation (p. 42, l. 17; R. 52) as to the purpose of the recall, at the same time preserving the objection as to materiality and relevancy.

The Court further made it clear (p. 43, l. 13 *et seq.*) that he was proceeding on the "stipulated fact" that appellees were recalled to active duty solely for the purpose of court-martial.

Appellants feel that they have met and gone beyond the standard noted by the Supreme Court in *Bridges* v. *Wixon*, 326 U.S. *135*, at *156*; 89 L.Ed. 2103; 65 S.Ct. 1443 (1945) where the Court said:

> "In these *habeas corpus* proceedings the alien [cf. United States] does not prove he had an unfair hearing merely by proving the decision to be wrong . . . or by showing that incompetent evidence was admitted and considered. . . . . But the case is different where evidence was improperly received and where *but for that evidence* [*i.s.*] it is wholly speculative whether the requisite finding would have been made."

Appellants submit that it is not even "speculative" as to whether the finding complained of would have been made absent the oral stipulation; it is a certainty.

Under the circumstances, then appellants feel that there was complete justification for their failing to print the portion of the proceedings dealing with the offering of and objections to the exhibits. We summarize briefly by repeating our opening position in this portion of the brief to the effect that the exhibits

in question were not offered for the use ultimately made of them by the Court, *contra* to appellees' argument. They were offered for another and limited purpose and must be presumed to have been so received. Even on their limited offer they were properly objected to. But counsel for appellees should not and cannot (as he does in his brief on page 5) argue that the exhibits, apart from the oral stipulation, sustain the judgment in any manner.

REPLY TO ANSWER TO APPELLANTS' ARGUMENT

Appellee states (page 6) that *Dakota* is not in point factually or legally. We are quite prepared to concede that the facts are different as they must be in every lawsuit for the case which is 100% "on all fours" is, of course, a legal myth. We cannot agree that they differ legally. The simple proposition advanced by the Supreme Court is that if the executive has *complete* discretion, the judiciary may not review it. We fail to see any legal distinction between power to take over a telephone company and power to order to active duty. Absolute discretion, says the Supreme Court, is not reviewable.

Appellees have at all times seemed unable to rid

themselves of the idea expressed in their brief on page 6 that Pasela's having been a civilian employee at the Navy Department is material. Analysis of that case shows clearly that the pertinent facts were (a) Pasela was a Fleet Reservist and hence subject to military law; (b) Pasela was tried for "bribery and conduct prejudicial to good order and discipline based upon . . . same theft for which he had been tried . . . district court" (167 F. 2d at 594), not for theft as contended by appellees in their brief, in violation of the Navy code; and (c) Pasela was returned to active duty for the purpose of court martial *but not in aid of jurisdiction.* We respectfully differ with the appellees in their statement (p. 7) that the court said "by way of *dictum* [*i.s.*] that . . . recall . . . [was] proper." The court very clearly erected three conditions precedent on page 594, line 25 *et seq.* (167 F. 2d) and said that the court-martial was "without power to try him" unless they were met. The first condition was the lawfulness of recall. If this be dictum, it is a peculiar way to express it.

We do not agree with the Court of Appeals that the lawfulness of the recall was material to the jurisdiction of the court-martial over a Fleet Reservist and had we appeared in the Connecticut District Court,

we should have so contended. However, that does not affect what the Court of Appeals for the Second Circuit *held.*

We are a bit at a loss to understand appellees' position as taken on page 7, line 7 *et seq.* of their brief wherein it is said, ". . . the fact of being . . . on active duty at the time of court-martial was immaterial to the court-martial jurisdiction of the Navy under the applicable law." Appellees in this language apparently concede that Congress by Section 6 of the Act of June 25, 1938 (52 Stat. 1176) could make Fleet Reservists, active duty or no, amenable to courts-martial, while contending vigorously from pages 10 - 19 of their brief that the same body did not cover retired personnel by the Act of May 5, 1950 (64 Stat. 108), 50 USC 551, Uniform Code of Military Justice, Article 1. The reasoning escapes us.

Counsel (page 7) states that there is a "vast difference between changing from an active to an inactive duty status within the active reserve and changing from a retired status to active duty" but he does not expand his assertion. We feel that our opening brief (pp. 7 - 11) covers the matter.

Appellees (page 8) have misconstrued our position in stating that we cite *Pasela* for the proposi-

tion that recall for court-martial is permissible. Nothing could be farther from correct. Our point was that nothing in the *Pasela* law or the instant law says that the call to active duty for such purpose is not permissible. The authority is in the statute — not *Pasela.*

U. S. v. *Warden* and *U. S.* v. *MacDonald* cited on page 8 of appellees' brief have no application. Both petitioners were "civilian reservists" (*i.e.* weekend warriors) and it has always been conceded by the armed forces that release from active duty on the case of a civilian reservist is equivalent to a discharge and terminates court-martial jurisdiction. We feel that the *U. S.* v. *Warden* decision might have read more accurately in its last portion had it said ". . . and recall to active duty will not confer court-martial jurisdiction [if it does not exist already]." While confusingly similar at first glance, the cases are really wide apart for in that case the petitioner was arguing that he could not be court-martialed because there had been a termination of jurisdiction and that such jurisdiction could not be revived by recalling him to active status. In the instant case, the matter of court-martial jurisdiction has not even been touched and the petitioners argue only (in this court) that they cannot be retained on active duty.

As to appellees' remarks on pages 8 - 9 of their brief, we feel that the subject of "duty" has been adequately covered in our opening brief. We prefer our quotation from Winthrop on page 19 of our brief.

REPLY TO APPELLEES' ARGUMENT IN SUPPORT OF THE JUDGMENT

Replying to appellees' argument set out on page 9 - 10 to the end of the first full paragraph, we feel that our brief (pp. 7 - 13) is a more reasonable explanation of the statutory language. Congress did not say in the statute "in support of the war or emergency effort" and if Congress did not do so, the Court should not.

Adverting to appellees' brief from the last paragraph of page 10 through page 19, we find that every word is in the nature of a plea to the jurisdiction of the court-martial. This is neither the time nor the court in which to raise such issue. *Gusik* v. *Schilder*, 340 U.S. 128, 95 L.Ed. 146, 71 S.Ct. 149 (1950). Such issue can and should be raised before the military court which provides in paragraph 67, a, Manual for Courts-Martial, 1951 (3 CFR 1951 Supp. p. 144) that "Defenses . . . such as that trial is barred by . . . lack of jurisdiction . . . should ordinarily be asserted by motion to dismiss before a plea is entered." Peti-

tioners should not be permitted to challenge the jurisdiction of the military court in this proceeding as that issue was never reached by the trial court (R. 35).

Respectfully submitted,

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